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Supreme Court of the United States

OCTOBER TERM, 1966

No. 456

BEYS AFROYIM,

Petitioner,

—v.—

DEAN RUSK, as Secretary of State,

Respondent.

BRIEF FOR PETITIONER

NANETTE DEMBITZ
New York Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010
Attorney for Petitioner

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BRIEF FOR PETITIONER

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 250 F. Supp. 686 (reproduced at R. 3). The opinion of the United States Court of Appeals for the Second Circuit is reported at 361 F. 2d 102 (reproduced at R. 13).

Jurisdiction

The petition for writ of certiorari was granted on October 24, 1966 (R. 20). The jurisdiction of this Court rests on 28 U. S. C., Section 1254(1).

Statute Involved

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, as amended by the Act of September 27, 1944, 58 Stat. 746, 8 U. S. C. (1946 ed.) §801, provided:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . .

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

This provision was reenacted as section 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, 8 U. S. C. §1481(a)(5).

Questions Presented for Review

1. Whether the statutory provision depriving an American citizen of his citizenship on the basis that he has voted in a foreign political election is invalid under the Fourteenth Amendment to the United States Constitution and the due process guarantee of the Fifth Amendment because such a vote in itself cannot reasonably be deemed to manifest an abandonment or dilution of allegiance to the United States.

2. Whether the provision is invalid under those Amendments because it imposes a loss of citizenship without sufficient justification in public need, and whether it is likewise invalid under the First Amendment because it unjustifiably restricts freedom of expression.

3. Whether the provision is invalid under the Fifth, Sixth and Eighth Amendments because it violates the safeguards provided by those Amendments with respect to the imposition of punishment.

Statement of the Case

Petitioner's complaint sought a declaratory judgment that section 401(e) of the Nationality Act of 1940, on its face and as applied to him, is unconstitutional and that he therefore retains his United States citizenship. The District Court judgment, affirmed by the Court of Appeals (R. 19), granted defendant-respondent's motion for summary judgment and denied plaintiff-petitioner's (R. 10).

The facts are undisputed and appear in the complaint, a stipulation of the parties, and an exhibit submitted by respondent at the District Court hearing.

Petitioner was born in Poland in 1893, emigrated to the United States in 1912, and became an American citizen by naturalization in 1926 (R. 11). In 1950, pursuing his profession as an artist, he went to Israel. In preparation for his return to the United States to reside here and continue his profession, he applied in 1960 to a United States Vice-Consul in Israel for the renewal of his American passport. His application was rejected on the ground that he had cast a ballot in an election in 1951 for the Israeli Knesset, the legislative body of Israel, and that he had thereby lost his American nationality pursuant to section 401(e) of the Nationality Act of 1940. The Vice-Consul's action was affirmed by the State Department's Board of Review on the Loss of Nationality (R. 11-12).

According to the stipulation, petitioner voluntarily voted in the 1951 election, and it constituted a political election in a foreign state within the meaning of section 401(e). Petitioner asserted in the complaint and stipulation that neither at the time of the election nor at any other time

did he intend or desire to lose or abandon his American citizenship and that he considered himself at all times an American citizen with allegiance to the United States. Respondent did not stipulate as to these assertions, maintaining that they are irrelevant (R. 11).

At the Israeli election in 1951, petitioner exhibited his Israeli identification booklet to an Israeli official at the polling-place. The booklet specified that petitioner was solely an American citizen (R. 2).

Summary of Argument

I.

A. In *Perez* v. *Brownell*, 356 U. S. 44, upholding section 401(e), the chief dissenting opinion expressed the principle that American citizenship can be abrogated by the Government only if the citizen voluntarily renounces it or his conduct manifests an abandonment of allegiance. Even if this Court declines to accept this principle in full, despite its historical and doctrinal support, the majority of the Court seems already to have recognized the danger of the *Perez* doctrine that expatriation is valid whenever Congress could have concluded not unreasonably that it bears a relevant connection with a governmental purpose. Opinions since *Perez* indicate that the act on which Congress predicates expatriation must manifest at the least a dilution of allegiance to this country.

B. The legislative history of section 401(e), together with precedents and principles relating to allegiance—both national and international—demonstrate that an American citizen's voting in a foreign political election cannot

be deemed in itself to signify a dilution of his fundamental allegiance to the United States. Because of the rationale of *Perez*, this issue was undecided and considered only parenthetically therein.

II.

A. Assuming *arguendo* that the Government can denationalize a citizen in the absence of his renunciation or abandonment of allegiance, the expatriation measure must be narrowly tailored to meet a compelling public need. Section 401(e) fails to satisfy this Constitutional criterion.

The only justification suggested for this expatriation provision is the danger of embarrassment in the conduct of this country's foreign relations. The international embarrassment to which expatriation legislation was historically directed, was a function of conflicting claims to an individual's allegiance and services—a problem which is not involved in section 401(e). Because the danger of embarrassment from a citizen's vote in a foreign election is, from all standpoints, highly improbable and speculative, it is insufficient to justify this broad and drastic provision for expatriation.

B. By the same token—because the only justification suggested for section 401(e) is a speculative, improbable, and in any event manageable danger—it violates the First Amendment's guarantee of free expression. The First Amendment limits the power of Congress to inhibit the expression of opinion by American citizens outside as well as inside our borders. And the expression of political opinion remains within the Amendment's protection, although it takes the crystallized form of voting.

III.

Since section 401(e) neither in genesis nor effect has served any purpose other than punitive, it is invalid because it fails to afford the safeguards provided by the Constitution with respect to the imposition of punishment.

ARGUMENT

I.

The expatriation provision is invalid under the Fourteenth and Fifth Amendments, because a vote by an American citizen in a foreign political election cannot reasonably be deemed in itself to manifest an abandonment or dilution of allegiance to the United States.

A. *Congress cannot abrogate American citizenship unless the citizen's act manifests an abandonment, or at least a dilution, of allegiance.*

The court below felt constrained to follow the ruling in *Perez* v. *Brownell,* 356 U. S. 44, upholding the denationalization provision here in issue, although the concurring judge pointed out that there is "grave doubt" as to that decision's vitality (R. 17).

The *Perez* rationale was that a statute imposing expatriation is valid whenever "Congress may have concluded not unreasonably that there is a relevant connection" between the content of a governmental power and the deprivation

of citizenship (356 U. S. at p. 58). Because of this basis for the decision, the majority only gave parenthetical consideration to the question of whether voting by an American citizen in a foreign election can reasonably be deemed to import a withdrawal of his allegiance to the United States.[1]

The principal dissenting opinion in *Perez* had, on the other hand, emphasized that the citizenship ordained by the Fourteenth Amendment can be abrogated by the Government only if the citizen voluntarily renounces it or his conduct manifests an abandonment of allegiance (356 U. S. at pp. 68-69, 76, 78).

Petitioner will not presume to recapitulate the reasoning of the dissenting Justices, rejecting the majority's attribution to Congress of a sweeping power to expatriate American citizens [the dissenting position was summarized in *Trop* v. *Dulles*, 356 U. S. 86, 92; *Nishikawa* v. *Dulles*, 356 U. S. 129, 138-139 (Justice Black concurring); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 162]. Suffice it to say that the dissenting position seems to effectuate the basic concept of the Government of the United States as the organ and agent of the community of individuals guaranteed citizenship by the Fourteenth Amendment. And the concomitant view—that Congress can predicate expatriation only on an act manifesting a renunciation, transfer, or abandonment of allegiance—seems likewise grounded in the bedrock of

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[1] See 356 U. S. at pp. 60-61, referring to a Congressional view on this issue, which apparently was inferred from a report by a committee in the Executive Branch on the proposed 1940 Act (quoted at 356 U. S. p. 54). For the legislative history, indicating that this report failed to reflect the viewpoint of Congress, see *infra*, pp. 9-12.

fundamentals and of history. When the concept of perpetual allegiance was supplanted by the principle of voluntary expatriation, the new doctrine meant that nationality "is supposed to cease whenever the subject or citizen renounces the old and assumes a new allegiance". H. R. Doc. No. 326, 59th Cong., 2d Sess. (1906) p. 12; see also p. 162.[2]

Even if the Court does not now fully accept the dissenting position as to the criteria of an expatriating act, the majority of the Court seems already to have recognized the danger of the *Perez* doctrine of a comprehensive Congressional authority to impose expatriation in aid of any governmental purpose. Opinions since *Perez* seem to have adopted the view that the act on which Congress predicates expatriation must at the least show a dilution of allegiance to this country (see *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 214, Justice Stewart dissenting; compare pp. 187-188, Justice Brennan concurring; see *Schneider* v. *Rusk,* 377 U. S. 163, 168-169; compare p. 176, Justice Clark's dissent).

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[2] See also Tsiang, The Question of Expatriation in America Prior to 1907 (1942) 101-102; 3 Moore, Digest of International Law (1906) 303, 306; *Comitis* v. *Parkerson,* 56 Fed. 556, 559-561 (Cir. Ct. E. D. La., 1893). A basic tenet as to citizenship is "the principle of *continuity,* by which the nationality of origin is retained until a new one is acquired." Borchard, Diplomatic Protection of Citizens Abroad (1916) p. 19. See also Preuss, *International Law and Deprivation of Nationality,* 23 Georgetown Law Journ. (1934) 250, 255.

B. *An American citizen's vote in a foreign political election cannot reasonably be deemed to manifest a dilution of allegiance to the United States nor, a fortiori, its abandonment.*

1. Legislative history of section 401(e).

Nothing in the history of this expatriation provision supports the view that an American citizen's voting abroad can be deemed to show a diluted allegiance to the United States.

The only precedent and the direct progenitor for section 401(e) was a bill introduced in 1935 by Representative Dickstein, who was then chairman of the House Committee on Immigration and Naturalization and continued in that position through the enactment of 401(e). The bill was occasioned by allegations that American citizens of German birth voted in favor of Germany, and thus Nazism, as against France in the plebiscite of January 13, 1935 to determine sovereignty of the Saar.[3] The "Dickstein bill to forfeit the citizenship of American nationals" voting in the plebiscite, was introduced shortly after it.[4]

The House Committee report on the bill stated that it had been introduced because "there is now no law on our statute

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[3] German natives, resident in the United States, returned to the Saar to vote in the plebiscite; whether they were naturalized American citizens or aliens, however, was not disclosed. New York Times for January 6, 1935, p. 20, col. 2.

Prior to the plebiscite, Rep. Dickstein announced that he would propose a bill "to deprive of citizenship all persons returning from this country to the Saar district to take part in the vote" and that, if the bill was not enacted before their return to this country, he would seek other means to deport them. (New York Times for January 4, 1935, p. 12, col. 3.)

[4] New York Times for January 17, 1935, p. 16, col. 2; see 79 Cong. Rec. 2050.

books which would permit any action leading to cancellation of (the) . . . United States citizenship" of Americans who voted in the plebiscite.[5] While the Committee was primarily concerned with "elections or plebiscites to determine sovereignty over foreign territory," it conceived of the bill as a general penalty provision, stating:

> "The purpose of the bill is to enact new legislation which will provide the penalty of loss of citizenship and nationality . . . (it is) legislation to serve lawful notice that hereafter citizenship here does not carry with it any loophole through which voting in foreign states may be done without penalty to the citizen so exercising foreign suffrage." [6]

The bill was dropped after it was opposed on the floor of the House on the ground that:

> "If you are going to confer citizenship by judicial process, then the proper thing to do is to divest them of that citizenship by a similar procedure. This bill makes no provision for proof, no provision for giving a man his day in court" (79 Cong. Rec. 2907).

At the request of the House Committee on Immigration and Naturalization, still chaired by Representative Dickstein, a committee was appointed by the President in the Executive Branch to draft a codification of the nationality laws (see 86 Cong. Rec. 11943). The recommended codification, completed by the President's committee in 1938 and enacted as the Nationality Act of 1940, included the Dickstein proposal as section 401(e).

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[5] House of Representatives Report No. 216, 74th Cong., 1st Sess., on H. R. 5799 (1935) p. 1.

[6] *Ibid.*, at pp. 2-3.

This section was in no sense a codification. The comparison tables show that the only previous laws considered at all relevant to it were those expatriating American citizens who were naturalized by, or took an oath of allegiance to, a foreign state. See tables, 86 Cong. Rec. 81. However, the Congressional reports and statements by Chairman Dickstein and others emphasized the codifying function of the bill that became the 1940 Act, and failed to explain—or even mention—the novelty of section 401(e).[7]

In a report in 1950 on a bill to ameliorate some of the hardships inflicted by section 401(e), a House subcommittee concurred in the view quoted above from the 1935 report, that the purpose of this expatriation provision is to impose a penalty on citizens voting abroad (H. R. No. 1469, 81st Cong. 2d Sess., 1950, p. 9).

In sum, there is no indication in the legislative history of a view, or of facts to support a view, that a vote in a foreign political election in itself signifies a change in allegiance.

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[7] See House Report 2396, 76th Cong. 3rd Sess. p. 1; Senate Report 2150, 76th Cong. 3rd Sess., printed at 86 Cong. Rec. 12430; 86 Cong. Rec. 11939-11965, 13244-13250, esp. 11942, 11949; Flournoy, *Nationality Act of 1940* (Contemporary Law Pamphlets, New York Univ. Law School, 1941) p. 5. (Mr. Flournoy was Assistant Legal Adviser to the State Department.)

The enactment clause of the 1940 Act stated: "That the nationality laws of the United States are revised and codified as follows" (54 Stat. 1137).

The hearings on the bill, held only in the House, were entitled: "To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code" (Hearings before House Committee on Immigration and Naturalization on H. R. 6127, January-June 1940). There is only brief mention of section 401(e) in the hearings: the Deputy Commissioner of Immigration stated that in some countries aliens are permitted to vote (p. 99); Mr. Flournoy said the section would be mainly applicable to dual citizens (pp. 98, 132); and Chairman Dickstein explained it in terms of Americans voting in the Saar plebiscite (pp. 286-287).

Rather, the history reflects concern primarily for a special form of election—a plebiscite—and a desire to impose a penalty.

It is true that the committee in the Executive Branch that drafted the 1940 statute, explained section 401(e) in terms that rationalized it with the committee's general declared purpose of imposing expatriation on those lacking a "real attachment" to the United States.[8] However, the codification committee's declaration as to a connection between a vote in a foreign political election and allegiance,[9] is unsupported by any analysis or precedent and ignores the fact that the provision merely had a punitive genesis. As a justification for an imposition of statelessness, moreover, the committee's *ipse dixit* seemed to carry little persuasiveness even at the time, since the State Department's expert on the bill apparently viewed 401(e) as explicable only in relation to dual citizens, with their vote indicative of a choice of their foreign nationality.[10]

2. No precedent or principle to support inference of change in allegiance.

There is no precedent or principle either in American or international law to support treatment of a vote in a foreign election as in itself an expatriating act or a manifestation of diluted allegiance to the country of nationality.

On the few occasions that the question arose in American courts, they held that American citizens were not expatri-

[8] See Codification of the Nationality Laws of the United States (report by President's Committee, H. R. Print), 76th Cong., 1st Sess., p. VII, quoted in *Perez*, 356 U. S. at p. 53.

[9] Ibid. at p. 67; quoted in *Perez*, 356 U. S. at p. 54.

[10] See citation to Mr. Flournoy's testimony, *supra* note 7.

ated because of their "exercise of political rights (abroad) such as voting, under circumstances not indicating any intention to renounce the original allegiance". Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 712 and cases there cited. Rulings to the same effect were made in the Executive Branch. Tsiang, *op. cit. supra* note 2, at p. 102. Likewise, no inference of a change of allegiance was drawn, apparently, from a vote by an alien in an election in this country, throughout the years when such voting was permitted (see 356 U. S. at pp. 77, 84-85).

Conversely, a person's United States citizenship did not *per se* entitle him to vote. See *Minor* v. *Happersett,* 88 U. S. (2 Wall.) 162, 170, holding that women were not entitled to vote by reason of their citizenship.

> "The courts almost unanimously have denied that the two (right of suffrage and citizenship) had any necessary connection and have held that not only might persons who are not citizens exercise the elective franchise (citation), but that citizens as such were not entitled to vote (citing cases)." H. R. Doc. No. 326, 59th Cong., 2d Sess. (1906) p. 46.

Thus, voting in a political election has not been treated in American law or custom as either a manifestation or a necessary corollary of allegiance. Looking outside our borders, the 401(e) rule is unique in expatriation laws throughout the world, both past and present.[11] And, as in

[11] The compendium prepared in 1929 as background for a proposed international codification, shows no law providing for denationalization on the basis of a vote in a foreign election. *Research in International Law, Draft Convention on Nationality* (Harvard Law School, 1929) pp. 100-106. The only country listed in a recent

American law, there seems to be no doctrine anywhere that voting in a country's election in itself confers its citizenship.

In sum, section 401(e) sprang exclusively from Representative Dickstein's innovative and punitive 1935 bill.

3. Inconsistency of inference with basic concepts of allegiance.

The inference required to justify section 401(e) is negated by the concept that a citizen's fundamental and enduring allegiance to his national government is to be distinguished from the "local and temporary allegiance" of an alien to the government of a country in which he resides.[12] In view of such "temporary allegiance" and the alien's subjection to the laws of his place of residence, according to unvarying national and international doctrine,[13] an American citizen's interest and participation in the affairs of his habitat abroad to the extent of voting in an election there, is not an unnatural concomitant of his residence.[14]

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compilation as having such a provision is the United States. *National Legislation Concerning Grounds for Deprivation of Nationality* (Report of United National General Assembly, International Law Commission, 5th Sess., 1953) p. 6. And see 356 U. S. at p. 77, n. 39.

[12] *Carlisle* v. *United States*, 83 U. S. (16 Wall.) 147, 154.

[13] See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 693-694; Borchard, op. cit., *supra*, p. 13, at p. 11; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356; Weis, *Nationality and Statelessness in International Law* (1956) 32-35.

[14] Section 401(e) applies even to a municipal election [*Bisceglia* v. *Acheson*, 196 F. 2d 865 (C. A. D. C. 1952); see also *Miranda* v. *Clark*, 180 F. 2d 257 (C. A. 9, 1950): "local primary election for city mayor"]; to a vote for "Commissar of the Agrarian Community" under the Mexican agricultural program [*Matter of R*_____ *R*_____, 3 I. & N. Dec. 890 (1950)]; to a vote in a local option determination on the sale of wine and beer, though it was designated

If voting by an American citizen is permitted by the foreign country in which he resides, his use of the privilege is indeed congenial to the tradition of political interest and expression nurtured in his sovereign country—the United States.[15]

4. State Department's view.

In explanation of a State Department ruling that an American citizen, a Mrs. Lepper, retained her citizenship despite her vote in a British general election, the Department stated:

> "The Department's administrative decision was that Mrs. Lepper had not lost United States citizenship under Section 349(a)(5) of the Immigration and Nationality Act by having voted in British General Elections on March 31, 1966. Only British subjects and

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by a local official as non-political. [*Matter of F*....., 2 I. & N. Dec. 427 (1946)]; and to a vote cast for the purpose of combatting Communism and promoting democracy [see *Acheson* v. *Wohlmuth*, 196 F. 2d 866, C. A. D. C. 1952 (cert. den. 344 U. S. 833); *Acheson* v. *Kuniyuki*, 189 F. 2d 741, reh. den. 190 F. 2d 897 (C. A. 9, 1951) cert. den. 342 U. S. 942].

[15] The inference that a vote abroad in itself signifies a change in allegiance, is inconsistent with common understanding. See H. R. No. 1469, 81st Cong. 2d Sess., 1950, p. 10, as to the unawareness of numerous American citizens, voting in various Italian elections, that their citizenship might be affected. Of the 5,376 American citizens denationalized in the years 1961 through 1965 because of their votes in foreign elections (see figures in Petr's. Memo. Suppl. to Pet. for Cert.), doubtless many were similarly unaware.

The enactment of numerous bills to relieve citizens from the effect of expatriation under section 401(e) (*Ibid.* at p. 4; and Pub. Law 114, c. 321, 81st Cong. 1st Sess.) bears out the conclusion (*supra*, p. 11) that Congress itself does not regard a vote abroad as necessarily a manifestation of diluted allegiance.

citizens of the Irish Republic were eligible to vote in the elections. Mrs. Lepper was neither a British subject nor a citizen of the Irish Republic and it was concluded by this Department that her vote was invalid under British law. In such circumstances, it is the Department's position that expatriation does not result." [16]

The State Department's ruling indicates that it does not regard a vote in a foreign election as expatriative because it manifests diluted allegiance to the United States, for from that standpoint the legality of the vote seems irrelevant.

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[16] Letter to Petitioner's attorney dated Oct. 19, 1966, from Robert D. Johnson, Deputy Director, Passport Office. The letter continued:

"Mr. Afroyim was of course eligible to vote in the elections for the Second Knesset of the State of Israel on July 30, 1951. There was no Israeli nationality status prior to April 1, 1952 . . ."

The Immigration and Naturalization Service seems to differ with the State Department, and holds that a vote cast in a foreign political election expatriates though it is invalid under the foreign law. *Matter of N*——, 3 I. & N. Dec. 829 (1950).

The two departments also differ on what elections should be deemed "political". See *Matter of Lyons*, 10 I. & N. Dec. 68, 69 (1962).

5. Violation of citizenship guarantee of Fourteenth Amendment and due process guarantee of Fifth Amendment.

History, principle and practice thus demonstrate that an American citizen's voting in a foreign political election cannot be deemed *per se* to signify a dilution of his fundamental allegiance to the United States. It may be true, as the dissenting Justices in *Perez* themselves observed, that under special circumstances his vote may so signify.[17] However, section 401(e) is a blanket and all-encompassing provision. And the abrogation of petitioner's American citizenship was based on his voting abroad *per se*. There was no finding or evidence that his voting was accompanied by any indication of a change in allegiance. Petitioner voted in the Israeli election openly and solely as an American citizen, Israeli law permitting him to do so; and he acquired no other citizenship or status by his participation in the election.[18]

Because voting abroad does not in itself manifest diluted allegiance, section 401(e) not only violates the guarantee

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[17] For example, a dual citizen's vote in a foreign country as a foreign citizen might raise a problem of allegiance to the United States, particularly if accompanied by a disclaimer of American citizenship. However, in evaluating this problem it must be borne in mind that dual citizenship, recognized and accepted in our law as it is internationally, "could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other" (*Kawakita* v. *United States*, 343 U. S. 717, 725). If the 401(e) rule was applied by other countries as well as the United States, the dual citizen would be unable to vote anywhere and retain his dual citizenship.

[18] Respondent recognizes that Israeli citizenship was created subsequent to the election at which petitioner voted. The right to vote in the 1951 election for the Knesset was based on residence rather than nationality. Warsoff, *Citizenship in Israel*, 33 N. Y. U. Law Rev. (1958) 857, 857.

of citizenship of the Fourteenth Amendment, but also the due process guarantee of the Fifth Amendment. Congress cannot, for the sake of administrative convenience, decree a blanket abrogation of citizenship on a ground irrelevant to allegiance, in order to encompass special situations which might furnish relevant grounds.[19]

Section 401(e) further violates the due process guarantee, in that it makes no provision for notice to the citizen that his innocuous act will result in a grave loss. Voting in a foreign election is not innately blameworthy so that a citizen would have reason to apprehend some dire consequence,[20] nor was it under national or international practice and custom attended by a loss of citizenship. Under these circumstances, even assuming *arguendo* that expatriation under section 401(e) is not deemed a penalty (see Point III *infra*), we believe due process requires actual warning to the citizen of his peril. Cf. *Lambert* v. *California*, 355 U. S. 225; *Morisette* v. *United States*, 342 U. S. 246.[21]

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[19] Compare *Harmon* v. *Forssenius*, 380 U. S. 528, 542.

[20] See note 15 *supra*.

[21] See 3 Moore, Digest of International Law (1906) 303, quoting Secretary of State Webster's statement in 1852: "'Change of allegiance . . . ought always to be accomplished by proceedings which are understood on all sides to have that effect . . .'"

Petitioner's expatriation because his vote was valid, while those casting invalid votes retain their American citizenship (*supra*, p. 16), is irrationally discriminatory and thus further violative of due process.

II.

The expatriation provision violates the Fourteenth Amendment, the due process guarantee of the Fifth Amendment, and the First Amendment because it imposes loss of citizenship and restricts freedom of expression without sufficient justification in public need.

A. *Violation of Fourteenth and Fifth Amendments.*

A deprivation so "profoundly destructive" of personal rights as expatriation,[22] is justifiable only if imposed by a measure carefully limited to meet a compelling public need. Expatriation, except as an effectuation by the Government of a citizen's deliberate renunciation or transfer of allegiance, must meet the most stringent constitutional test. Abrogation of a right explicitly guaranteed by the Fourteenth Amendment is intolerable on a lesser justification than infringement of a First Amendment right or other basic liberties.[23]

We submit that section 401(e) is unconstitutional under the standard of review here applicable, nor indeed does it even satisfy the minimum test—a rational basis.

Perez, seeking a rationale for 401(e), inferred "in light of the historical background of expatriation in this country," that Congress acted under its power over foreign affairs and to avoid embarrassment in their conduct (356 U. S. at

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[22] *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 188 (Justice Brennan concurring).

[23] See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 508, and cases there cited; compare *United States* v. *Wong Kim Ark,* 169 U. S. 649, 694.

pp. 57-60). However, the international embarrassments and frictions to which expatriation provisions were historically directed, related to "conflicting claims" to an individual's allegiance or services (356 U. S. at p. 50).[24] In contrast, section 401(e) applies to persons who are solely American citizens and to an act—the act of voting in a foreign country, which neither confers that country's citizenship (see *supra*, p. 14) nor is a source of "conflicting claims". The embarrassments with which expatriation was historically concerned, are thus irrelevant to section 401(e).

Nor is there any basis for attributing to Congress in section 401(e) an intent to prevent embarrassments in foreign affairs. None of the reports or statements in explanation of 401(e) or its 1935 progenitor give any hint of an apprehension of international embarrassment because of Americans voting abroad (see *supra*, pp. 9-12); and we need not consider whether such prevention was a purpose of any previous enactment since 401(e) was not a codification (see *supra*, p. 11).

Further, the history of the event that stimulated this provision—the Saar plebiscite—wholly negates the *Perez* hypothesis that Americans voting abroad may appear to represent this Government's views and thus embarrass its

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[24] The purpose of early expatriation rulings, treaties and legislation was to deal with problems of dual nationality and transfer of allegiance. See Note, The Expatriation Act of 1954, 64 Yale Law Journ. (1955) 1164, 1173-4; Tsiang, *op. cit., supra* n. 2, at pp. 88-90, 112. Both *Mackenzie* v. *Hare*, 239 U. S. 299, and *Savorgnan* v. *United States*, 338 U. S. 491, involved these problems. Judicial reference to "embarrassment" in foreign relations as the justification for expatriation legislation seems to have originated in *Mackenzie* (see 239 U. S. at p. 312).

conduct of foreign affairs.[25] Nor would this inference as to representation be drawn by any foreign government acquainted with diplomatic or democratic usage.[26] Further, the fact that no other country has found it necessary to adopt legislation like 401(e) (see *supra*, p. 13) also indicates the unreality of the *Perez* supposition of international embarrassment.

Finally, as indicated by the concurring judge in the court below (R. 18), in a case like petitioner's, where the voter's American citizenship is open and avowed and the foreign government authorizes aliens to vote, any possibility of embroilment or embarrassment between the United States government and the foreign government is removed (to the same effect, see Justice Whittaker's dissent in *Perez*, 356 U. S. at p. 85).[27]

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[25] In the reports on the plebiscite there was no hint whatsoever that the 800-odd votes cast by "North American residents" were deemed to represent the views of the United States government. See New York Times for January 16, 1935, p. 12, cols. 3-8; p. 13, cols. 1-6. And our Government apparently experienced no embarrassment or concern in relation to Germany, France, or any other country over any votes that might have been cast by American citizens. No such factor figured in its reactions to the plebiscite. Rather, "satisfaction over the settlement of the Saar problem was expressed . . . by the State Department" (based on the clarity of the choice of the Saarlanders). New York Times for January 16, 1935, p. 12, col. 3; for a similar reaction by the British government, see p. 13, col. 4.

[26] The only reference cited in *Perez* in support of the inference is "Cf. Preuss, International Responsibility for Hostile Propaganda Against Foreign States, 28 Am. J. Int'l L. 649, 650" (356 U. S. at p. 59). The cited page notes that a government is not responsible internationally for acts of private citizens, and quotes the American rejection in 1885 of a protest by Spain respecting propaganda in the United States against the Spanish government in Cuba.

[27] Cf. the State Department's construction of the voting provision as applicable only to a lawful vote, *supra*, p. 16.

The *Perez* suggestion of "problems of protection" of American citizens abroad (356 U. S. at p. 57) likewise seems unreal as applied

Accordingly, we submit that section 401(e) lacks rational connection with the congressional power over foreign affairs or any other power. But assuming *arguendo* that there is some possibility of international embarrassment through Americans voting in foreign elections, surely it is not a sufficient danger to warrant this drastic expatriation measure. *Perez* suggests that expatriation is an effective method of handling the supposed embarrassment because "the termination of citizenship terminates the problem" (356 U. S. at p. 60). Thus, justification for expatriation rests at best on the slim difference in efficacy between this Government's statement that the individual is no longer an American citizen and a statement that in his political views he is not controlled by, and does not represent this Government.[28]

Both the Fourteenth Amendment and the Fifth Amendment's due process guarantee are violated by the abrogation of citizenship for such a speculative, slim advantage to the public as that posited in *Perez*. The right of citizenship is more precarious and insubstantial than the Fourteenth Amendment intended if it can be so casually abrogated.

B. *Violation of First Amendment.*

The casting of a ballot is an expression of political opinion; crystallization in the form of a vote does not, we suggest, remove expression from the protection of the First Amendment. Cf. *Harper* v. *Virginia State Board of*

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to a citizen lawfully voting in a foreign country. In any event, protection of citizens abroad is discretionary, and is not a significant consideration with respect to citizenship and expatriation. *Mandoli* v. *Acheson*, 344 U. S. 133, 137, note 8.

[28] See statement to Government of Spain, cited *supra* note 25.

Election, 383 U. S. 663, 665. Further, the Bill of Rights protects American citizens outside as well as inside our borders against action by this Government. See *Reid* v. *Covert,* 354 U. S. 1, 5-6, 8-9.

Since the purpose and effect of section 401(e) is to deter expression of political opinion through voting in a foreign election, it violates the First Amendment because it is not justified by a clear and serious public danger. See discussion of First Amendment tests in *Dennis* v. *United States,* 341 U. S. 494, 502-511. For the only ground consonant with the Government's Constitutional powers suggested in justification for section 401(e), is the highly speculative—and in any event manageable—danger of embarrassment in the conduct of foreign affairs.

Perez explains section 401(e) in part on the basis that by voting in a foreign election "The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government" (356 U. S. at p. 59). If this means, as it seems to, that Congress can, in the conduct of foreign affairs, curtail the right of American citizens to support a policy contrary to the Administration's, it posits a rationale inconsistent with the First Amendment.[29] The First Amendment precludes a Congressional effort to inhibit dissent from the Administration's foreign policy, whether on foreign or American soil. (See District Court opinion, R. 8; Justice Douglas' dissent in *Perez,* 356 U. S. at pp. 81-82; compare *Kent* v. *Dulles,* 357 U. S. 116, 130; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 517.)

[29] The effect of 401(e) on First Amendment rights was not considered in *Perez.* See *Trop* v. *Dulles,* 356 U. S. 86, 106, n. 2 (Justice Brennan concurring).

III.

The statute is invalid under the Fifth, Sixth and Eighth Amendments because it violates the safeguards provided by those amendments with respect to the imposition of punishment.

Section 401(e) originated in a punitive and retributive purpose; both in origin and effect it is unconnected with a regulatory objective (*supra*, pp. 12, 22). The reasoning of *Trop* v. *Dulles*, 356 U. S. 86, and *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (especially pp. 180-184), should therefore be applied to invalidate it.

Particularly because 401(e) applies to one who is solely an American citizen, and thus imposes statelessness, there is no doubt that it inflicts a harsh deprivation (see *Mendoza-Martinez*, 372 U. S. at p. 161).[30]

The fact that the provision involves no moral wrong or act deserving of punishment does not gainsay the actuality of a punitive purpose and the lack of regulatory objective.[31] Indeed, the failure of 401(e) to provide for notice that the

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[30] Statelessness is, among other things, homelessness. An essential benefit of citizenship is the citizen's right to reside in or return to the territory of his State. I Oppenheim, *International Law* (Lauterpacht, 8th ed., 1958) 646; Borchard, *Diplomatic Protection of Citizens Abroad* (1916) 25; *Worthy* v. *United States*, 328 F. 2d 386, 394 (C. A. 5, 1964).

Figures are unavailable on how many of the hundreds of individuals denationalized yearly because of voting abroad (see *supra* note 15 for statistics) are excluded from the United States and how many deported; Perez himself was under a deportation order (356 U. S. at p. 47).

[31] It may be noted that in countries without our Constitutional restrictions, expatriation is used as punishment. See Roche, The Expatriation Cases, 1963 Supreme Court Review 325, 334.

innocuous act of voting will be visited by a grave penalty is an additional due process objection to the section (see *supra*, p. 18).

CONCLUSION

It is respectfully submitted that the judgment below should be reversed and the provision for expatriation of an American citizen on the basis of his voting in a foreign political election should be held unconstitutional.

Respectfully submitted,

NANETTE DEMBITZ
New York Civil Liberties Union
156 Fifth Avenue
New York, N. Y. 10010
Attorney for Petitioner

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